Filed 10/22/12 P. v. Holder CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW JACKSON HOLDER,

Defendant and Appellant.

F062803

(Super. Ct. No. MCR038325)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Andrew Jackson Holder of nine sexual offenses against his girlfriend's granddaughters: three counts of sexual intercourse with a child 10 years

or younger (Pen. Code,[1] § 288.7, subd. (a); counts 1, 6 & 7); two counts of lewd acts on a child under the age of 14 years (§ 288, subd. (a); counts 2 & 8); two counts of forcible lewd acts on a child under the age of 14 years (§ 288, subd. (b)(1); counts 3 & 9); and two counts of oral copulation with a child 10 years or younger (§ 288.7, subd. (b); counts 4 & 5).[2] Appellant received an aggregate prison term of 131 years to life. On appeal, appellant contends a detective violated his Fifth Amendment rights by failing to advise him of his *Miranda*[3] rights before questioning him. However, we agree with the trial court that appellant was not in custody at the time of the questioning, and therefore *Miranda* did not apply. Accordingly, we affirm the judgment.

BACKGROUND[4]

On May 23, 2011, the trial court conducted an evidentiary hearing, under Evidence Code section 402, to determine the admissibility of statements appellant made to Madera County Sheriff's Detective Jack Williamson, and a cell phone appellant gave to the detective during their interview. After Detective Williamson testified and the court listened to the audio recording of the detective's interview with appellant, the court rejected appellant's motion to suppress his statements on the ground Detective Williamson failed to advise him of his *Miranda* rights before questioning. In ruling on the motion, the trial court found there were no "indications of any coercion or in-custodial interrogation or detention." The court explained: "Reading the transcript, it appears that way. It appears that way even more so listening to the audio version of the conversation."

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 Jane Doe No. 1 was the victim of counts one through seven, and Jane Doe No. 2 was the victim of counts eight and nine. Both victims testified, in detail, against appellant at trial.

3 See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

4 We omit a summary of the facts underlying appellant's convictions; we need not refer to them to resolve the issue on appeal.

During the hearing, Detective Williamson testified for the prosecution that in June 2010, he drove to appellant's residence in Oakhurst. The detective wore casual clothes and drove an unmarked white Expedition. Sheriff's Deputy Jeff Nolan also came to appellant's residence. Deputy Nolan drove a marked sheriff's vehicle with a green stripe and lights on top.

Appellant was the first person Detective Williamson made contact with at the residence. Appellant came outside to meet him. The detective identified himself and told appellant he would like to talk to him about a case on which he was working. Appellant's response was one of surprise. "He acted like he didn't know what was going on."

A minute or two after contacting appellant, Detective Williamson started recording their conversation. Appellant and the detective sat on separate benches located about 50 to 75 feet away from the residence. Deputy Nolan stood 10 to 15 feet from appellant and the detective. When asked why Deputy Nolan stood so far away, Detective Williamson testified: "Uh, he was there to keep an eye to make sure everything was okay so I could focus on the interview. Uh, he didn't have any knowledge of the interview. He wasn't—he was just there to observe and make sure I was okay during the interview." Detective Williamson did not think Deputy Nolan could hear anything he and appellant were saying, explaining, "It was far enough away that we had some privacy."

Following this testimony, the prosecutor played a recording of the interview and provided the court with a transcript. Detective Williamson confirmed that it was an accurate description of his conversation with appellant. In the interview, appellant ultimately admitted to having sexual contact with Jane Doe No. 1 but claimed the contact was consensual and never forced. He also admitted that his cell phone contained sexually explicit photographs of Jane Doe No. 1. After appellant made these admissions, Detective Williamson informed appellant that he was placing him under arrest for child molestation and directed Deputy Nolan to place handcuffs on appellant.

After the trial court listened to the interview, defense counsel cross-examined Detective Williamson. When asked how many officers came up to appellant's house, the detective testified: "Originally, just myself and Jeff Nolan. Other deputies came during the interview and they were parked down the driveway towards [appellant's work]shop." Detective Williamson did not know at what point in the interview the other deputies showed up. The other deputies were visible from where he was speaking to appellant.

Detective Williamson also testified on cross-examination that he knew appellant prior to the investigation. He needed a stainless steel backsplash for his kitchen and a contractor recommended appellant for the job. This job was the detective's only prior contact with appellant and he did not know if appellant remembered him from it.

Finally, Detective Williamson confirmed that he only spoke with appellant for a couple of minutes before he started recording their conversation. The detective recalled telling appellant he would like to talk to him and they "sat down outside to have some privacy from his family." He acknowledged that, at the time of his interview with appellant, he had already heard a forensic interview of the victim.

DISCUSSION

Appellant argues the trial court erred in denying his motion to suppress. However, like the trial court, we conclude appellant was not in custody when he made the statements to Detective Williamson. Therefore, we uphold the trial court's ruling.

"*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Whether a suspect is in custody is resolved by asking whether the circumstances "created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) This is a mixed question of law and fact, requiring us to "apply a deferential substantial evidence standard to the trial court's factual findings, but

independently determine whether the interrogation was custodial. [Citation.]" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.)

Factors bearing on the custody issue include: (1) whether the suspect was formally arrested before questioning; (2) absent formal arrest, the length of his detention; (3) where it occurred; (4) the ratio of officers to suspects; and (5) the demeanor of the officers. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]" (*People v. Pilster*, *supra*, 138 Cal.App.4th at pp. 1403-1404.)

Of the first five factors set forth above, four factors support the conclusion that appellant was not in custody for *Miranda* purposes during his interview with Detective Williamson. Appellant was not formally arrested. The interview, which lasted just under 30 minutes, occurred "not in an isolated chamber under psychological coercion, but in the familiar surroundings of his own front yard." (*People v. Miller* (1969) 71 Cal.2d 459, 481.) The audio recording reflects that Detective Williamson's demeanor towards appellant throughout the interview was cordial and nonthreatening.

The ratio of officers to suspect was the only factor, among the first five, that arguably pointed towards custody. Thus, appellant contends the presence of Deputy Nolan and the arrival of additional deputies during the interview, "strongly indicated appellant was in custody." Several circumstances, however, weaken appellant's position. Although Deputy Nolan was standing nearby, he did not participate in the interview and was not informed of the subject matter. In addition, Deputy Nolan was standing far enough away that Detective Williamson did not think the deputy could hear what he and

appellant were discussing. Moreover, although Detective Williamson testified that the additional deputies—who arrived at an unspecified point during the interview—were visible from where he and appellant were seated, there is no indication appellant even noticed them, or that their presence otherwise affected him or altered the tone of the interview.

Similarly, a majority of the additional factors, set forth above, supports the conclusion that appellant was not in custody. It appears from the transcript of the interview that appellant voluntarily went out to speak with Detective Williamson. Although appellant was not expressly told he could terminate the questioning at any time, the detective did not pressure him to answer any questions. It is true that Detective Williamson revealed early on that appellant was the subject of his investigation—a factor pointing towards custody. On the other hand, the detective was not aggressive, accusatory, or confrontational in his questioning of appellant. He did not dominate or control the interview. Indeed, he noticeably allowed appellant to digress to irrelevant topics at various points during the interview.

Moreover, contrary to appellant's suggestion, there is no indication that Detective Williamson restrained appellant's movements during the interview. Appellant refers to the portion of the interview where the detective asked appellant if he could see appellant's cell phone. Appellant responded by telling the detective he would have to go inside the house to get it, adding "if you don't mind." Appellant interprets this request for permission to go inside the house as evidence that he did not feel free to move during the interview. However, when read in context, it appears his request was simply a continuation of the polite tone both men had adopted during the interview. Thus, the detective responded to appellant's request by asking, "*Do you mind* … showing that to us?" (Italics added.) Appellant replied, "No, not at all" and then agreed to the detective's proposal that they go inside to get the phone.

After they went inside the house and got the cell phone, Detective Williamson said, "We'll go back outside that way we can have a little privacy." Appellant responded, "Okay." We do not agree with appellant's suggestion that this exchange shows that the detective "directed" his movements to a degree associated with a formal arrest. The record reflects there were three women and pets in close quarters when appellant and the detective went inside the house, so it is not surprising that the detective suggested they return outside to talk. In any event, the record shows that, even before they went inside the house, appellant had already agreed to the detective's suggestion that, after retrieving the cell phone, appellant show him his shop and around the the property.

Once they were back outside the house, Detective Williamson asked appellant to tell him, before he looked, if there were any bad pictures on the phone, to which appellant replied, "I'll tell ya before you look. There is." After appellant admitted there were pictures of the victim on his phone, Detective Williamson continued to question appellant in a polite, conversational tone. Appellant answered freely, without any apparent pressure from the detective. In the trial court's words, it appears "everything was done voluntarily and willingly" by appellant.

Although appellant was arrested at the end of the interview, this factor alone does not render the preceding interview custodial. Based upon careful consideration of the totality of the circumstances, we hold that the trial court properly concluded that the interview was noncustodial for *Miranda* purposes. Therefore, we uphold the denial of the suppression motion and admission of appellant's statements at trial.

DISPOSITION

The judgment is affirmed.

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HILL, P. J.

WE CONCUR:

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WISEMAN, J.

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KANE, J.